

Jun 23, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND  
BANDS OF THE YAKAMA NATION,  
Plaintiff,  
v.  
CITY OF YAKIMA, a municipal  
corporation,  
Defendant.

No. 1:20-CV-03156-SAB

**ORDER GRANTING MOTIONS  
FOR PROTECTIVE ORDER**

Before the Court is the parties' Joint Motion for "Clawback" Protective Order, ECF No. 21, Joint Motion for Protective Order Regarding Confidentiality Issues, ECF No. 22, and associated Stipulated Motion to Expedite Hearings on Joint Motions for Protective Orders, ECF No. 23. The motions were considered without oral argument and on an expedited basis.

**Joint Motion for "Clawback" Protective Order**

The parties request the Court enter a proposed protective order regarding privileged materials. *See* ECF No. 21-1. The parties have conferred and determined that documents covered by the attorney-client and work product privilege will be exchanged through the course of discovery. *See* ECF No. 21 at 2. Due to the large volume of the electronic and hard copy data subject to discovery, the parties seek

1 entry of a “clawback” provision to expedite discovery and facilitate production while  
2 protecting against inadvertent disclosure of privileged documents. *Id.* at 2–3.

3 Pursuant to Federal Rule of Civil Procedure 26(c), the Court finds good cause  
4 to grant the “clawback” protective order. Denial of the protective order will impair  
5 the parties’ ability to undertake or complete discovery tasks and review of materials  
6 in a timely manner. Furthermore, the Court finds the protective order in this case  
7 will promote judicial efficiency and conservation of the parties’ limited resources.

### 8 **Joint Motion for Protective Order Regarding Confidentiality Issues**

9 The parties further request the Court enter a proposed protective order  
10 regarding discrete confidentiality issues. *See* ECF No. 22-1. The parties have  
11 conferred on this issue and believe that confidential materials may be disclosed  
12 through the course of discovery, including: (i) documents that provide login  
13 information, including conference call passcodes and/or weblinks; (ii) documents  
14 that mention the health status of employees, such as medical and/or maternal leaves  
15 of absence; and (iii) documents that disclose financial details not related to this  
16 litigation. ECF No. 22 at 2–3. The parties seek confidentiality protection for these  
17 three categories of documents. *Id.*

18 Pursuant to Rule 26(c), the Court holds that good cause exists to grant the  
19 protective order regarding confidentiality. Given the voluminous discovery in this  
20 case, the Court finds that a protective order regarding confidentiality will promote  
21 judicial efficiency and conserve the parties’ limited resources. The Court also finds  
22 the order will not prejudice the rights and interests of the parties in the case.

23 Accordingly, **IT IS HEREBY ORDERED:**

24 1. The parties’ Stipulated Motion to Expedite Hearings on Joint Motions  
25 for Protective Orders, ECF No. 23, is **GRANTED**.

26 2. The parties’ Joint Motion for Protective Order, ECF No. 21, is  
27 **GRANTED**.

1        3.     The parties' Joint Motion for Protective Order, ECF No. 22, is  
2 **GRANTED.**

3        4.     The Court imposes the following Protective Orders in the above-  
4 captioned case:

5                    **“CLAWBACK” PROTECTIVE ORDER**

6        5.     This Order invokes the protections afforded by Rule 502(d) of the  
7 Federal Rules of Evidence. Accordingly, the provisions in Rule 502(b) do not apply  
8 to the disclosure of communications or information in discovery in this matter.

9        6.     Each Party is entitled to decide the appropriate degree of care to  
10 exercise in reviewing materials for privilege, taking into account the volume and  
11 sensitivity of the materials, the demands of the litigation, and the resources that the  
12 party can make available. Irrespective of the care that is actually exercised in  
13 reviewing materials for privilege, the Court hereby orders pursuant to Rule 502(d)  
14 of the Federal Rules of Evidence that disclosure of privileged or protected  
15 information or documents in connection with this litigation will not constitute or be  
16 deemed a waiver or forfeiture—in this or any other federal or state proceeding—of  
17 any claims of attorney-client privilege, work product protection, or other privilege  
18 that the disclosing Party would otherwise be entitled to assert with respect to the  
19 information or documents and their subject matter.

20        7.     The Court further orders that because expedited or truncated privilege  
21 review is likely necessary in pursuit of the just, speedy, and inexpensive resolution  
22 of this matter, the disclosure of privileged or protected information or documents in  
23 discovery conducted in this litigation will be deemed unintentional and inadvertent.  
24 Such disclosure will not constitute a waiver of the disclosing Party's right to claim  
25 any privilege or protection that would have applied to the information or documents  
26 or their subject matter but for the disclosure.

27        8.     Regardless of whether the procedures to screen out privileged materials  
28 were reasonable, the Parties shall not argue, in this forum or any other, that any

1 privileges were waived as a result of disclosures in this litigation. A Party may  
2 challenge the applicability of a claimed privilege on any other ground, as further  
3 described in paragraphs 12 and 14, below.

4       9. If a Party determines that it has produced a document upon which it  
5 wishes to make a claim of privilege, the producing Party shall, within 21 days of  
6 making such determination, give all counsel of record notice of the claim of  
7 privilege. The notice must identify each such document and the date it was produced.  
8 If the producing Party claims that only a portion of a document is privileged, the  
9 producing Party shall provide, along with the notice of the claim of privilege, a new  
10 copy of the document with the allegedly privileged portions redacted. Any Party that  
11 complies with this paragraph will be deemed to have taken reasonable steps to rectify  
12 disclosures of privileged or protected information or materials.

13       10. If a Party identifies a document that appears on its face or in light of  
14 facts known to the Party to be subject to another Party's claim of privilege, the Party  
15 identifying the potential claim of privilege is under a good-faith obligation to notify  
16 the Party holding the potential claim of privilege. Such notification will not waive  
17 the identifying Party's ability to subsequently challenge any assertion of privilege  
18 with respect to the identified document. If the Party holding the potential claim of  
19 privilege wishes to assert a claim of privilege, it shall provide notice within 14 days  
20 of receiving notice from the identifying Party.

21       11. Upon receiving notice of a claim of privilege on a produced document,  
22 the receiving Party shall, in accordance with Fed. R. Civ. P. 26(b)(5)(B), promptly  
23 sequester the specified information and any copies it has and shall not use or disclose  
24 the information, except as provided by Fed. R. Civ. P. 26(b)(5)(B), until the claim is  
25 resolved. Copies of privileged documents or information that have been stored on  
26 electronic media that is not reasonably accessible, such as disaster recovery backup  
27 media, are adequately sequestered as long as they are not restored; if such data is  
28 restored, the receiving Party shall take steps to re-sequester the restored information.

1 If the receiving Party disclosed the information before being notified, it shall take  
2 reasonable steps to prevent further use of such information until the claim is  
3 resolved.

4 12. A Party that wishes to dispute a claim of privilege asserted under this  
5 Order shall do so under the Federal Rules of Civil Procedure and any applicable  
6 local rules. The disputing Party shall not assert, as a ground for compelling  
7 disclosure, the fact or circumstance of the disclosure, including the degree of care  
8 actually exercised in reviewing the material at issue for privilege. Pending resolution  
9 of the dispute, the Parties shall not use the challenged information for any other  
10 purpose and shall not disclose it to any person other than those required by law to be  
11 served with a copy of the motion.

12 13. Nothing in this Order overrides any attorney's ethical responsibilities  
13 to refrain from examining or disclosing materials that the attorney knows or  
14 reasonably should know to be privileged and to inform the disclosing party that such  
15 materials have been produced.

16 14. The Party wishing to assert a claim of privilege retains the burden of  
17 establishing the applicability of the claimed privilege.

18 15. This Order does not preclude a Party from voluntarily waiving any  
19 claims of privilege. The provisions of Rule 502(a) of the Federal Rules of Evidence  
20 apply when a Party uses privileged information to support a claim or defense.

#### 21 **PROTECTIVE ORDER REGARDING CONFIDENTIALITY**

22 16. **Definitions.** As used in this Protective Order Regarding  
23 Confidentiality:

24 A. "attorney" means an attorney who has appeared in this action;

25 B. "confidential document" means a document designated as  
26 confidential under this Protective Order;

27 C. to "destroy" electronically stored information means to delete from  
28

all databases, applications, and file systems so that the information is not accessible without the use of specialized tools or techniques typically used by a forensic expert;

D. “document” means information disclosed or produced in discovery, including at a deposition;

E. “notice” or “notify” means written notice;

F. “party” means a party to this action; and

G. “termination of this action” means the time at which an appeal from the trial court’s final judgment has been exhausted or the time to appeal has expired.

**17. Designating a document or deposition as confidential.**

A. The parties shall make best efforts to avoid overly broad confidential designations and shall not make blanket claims of confidentiality. A party disclosing or producing a document may designate it as confidential if the party contends that it contains confidential or proprietary information under the following three categories:

i. Documents that provide login information, including conference call passcodes and/or weblinks.

ii. Documents that mention the health status of employees, such as medical and/or maternity leaves of absence.

iii. Documents that disclose financial details that are not related to this litigation.

B. A party may designate a document as confidential by conspicuously marking each page with the word “confidential.”

**18. Who may receive a confidential document.**

A. A confidential document may be used only in this action.

B. No person receiving a confidential document may reveal it, except to:

- 1 i. the court and its staff;  
2 ii. an attorney or an attorney's partner, associate, or staff;  
3 iii. a person shown on the face of the confidential document to  
4 have authored or received it;  
5 iv. a court reporter or videographer retained in connection  
6 with this action;  
7 v. a party; and  
8 vi. any person who is retained to assist a party or attorney with  
9 this action if that person either:

- 10 (1) receives only a redacted copy of a confidential  
11 document, with all confidential information removed; or  
12 (2) signs a declaration that contains the person's name,  
13 address, employer, and title, and that is in substantially  
14 this form:

15 I have read, and agree to be bound by, the  
16 protective order in the case captioned 1:20-CV-  
17 03156-SAB. As soon as my work in connection  
18 with that action has ended, but not later than 30 days  
19 after the termination of this action (including any  
20 appeals), I will return or destroy any confidential  
21 document that I received, any copy of or excerpt  
22 from a confidential document, and any notes or  
23 other document that contains information from a  
24 confidential document.

25 I declare under penalty of perjury that the  
26 foregoing is true and correct.

27 C. If a confidential document is revealed to someone not entitled to  
28 receive it, the parties must make reasonable efforts to retrieve it.

1        19. **Correcting an error in designation.** A party who discloses or  
2 produces a confidential document not designated as confidential may, within 7 days  
3 after discovering the error, provide notice of the error and produce a copy of the  
4 document designated as confidential.

5        20. **Use of a confidential document in proceedings.**

6            A. Filing. Any party that wishes to file a confidential document with  
7 the Court or present the other party's confidential document at a deposition, hearing,  
8 or trial shall first:

- 9                    i. Notify the other party of its intended use of the document;  
10                   ii. Confer with the other party to determine what portion of the  
11                   document contains confidential information;  
12                   iii. Propose a redaction to the document that will remove or  
13                   conceal all confidential information, thus eliminating the need to  
14                   designate the document confidential; and  
15                   iv. Cooperate in good faith with the other party to resolve any  
16                   disputes regarding the scope of the redaction.

17            B. Presentation at hearing or trial. Any party receiving notice under  
18 subsection (A) of this section shall:

- 19                   i. Promptly confer in good faith with the other party to determine  
20                   what portion of the document contains confidential information;  
21                   ii. Promptly respond to the other party's proposed redaction by  
22                   either agreeing to the redaction or specifying that portion of the  
23                   document which requires further redaction; and  
24                   iii. Cooperate in good faith with the other party to resolve any  
25                   disputes regarding the scope of the redaction.

26            C. Any document redacted by agreement of the parties using the  
27 procedures specified in this section shall not be designated confidential, and a party's  
28 use of the redacted document shall not be restricted.

1 D. If the parties cannot reach agreement on the redaction of a  
2 confidential document after following the procedures specified in this section, any  
3 party may seek relief from the Court. If any party needs to file a confidential  
4 document for which the parties have not reached agreement on redactions, the party  
5 filing the confidential documents with the Court shall do so only under seal in  
6 accordance with all applicable court rules, policies, procedures, and orders. **If a**  
7 **party seeks to file a confidential document under seal, the party must first**  
8 **request permission from the Court prior to doing so.** If a party intends to present  
9 another party's confidential document for which the parties have not reached  
10 agreement on redactions at a deposition, hearing, or trial, that party must promptly  
11 notify the other party so that the other party may seek relief from the Court.

12 **21. Changing a confidential document's designation.**

13 A. Document disclosed or produced by a party. A confidential  
14 document disclosed or produced by a party remains confidential unless the parties  
15 agree to change its designation, the document is redacted under paragraph 20 of this  
16 Order, or the court orders otherwise.

17 B. Changing a designation by court order. A party may object to a  
18 particular designation by giving written notice to the party designating the disputed  
19 information. The written notice shall identify the information to which the objection  
20 is made. If the parties cannot resolve the objection within fourteen (14) days after  
21 the time the notice is received, it shall be the obligation of the party designating the  
22 information to file an appropriate motion requesting that the Court determine  
23 whether the disputed information should be protected by the terms of this Protective  
24 Order. If such a motion is timely filed, the disputed information shall remain  
25 protected under the terms of this Protective Order until the Court rules on the motion.  
26 If the designating party fails to file such a motion within the prescribed time, the  
27 disputed information shall lose its designation and shall not thereafter be protected  
28 by the terms of this Protective Order. In connection with a motion filed under this

1 provision, the party who designated a document as confidential must show that the  
2 designation satisfies Fed. R. Civ. P. 26(c).

3       **22. Handling a confidential document after termination of litigation.**

4           A. Within 60 days after the termination of this action (including any  
5 appeals), each party must:

6                   i. return or destroy all confidential documents; and

7                   ii. notify the disclosing or producing party that it has returned or  
8 destroyed all confidential documents within the 60 day period.

9           B. Notwithstanding paragraph 22(A), each attorney may retain a copy  
10 of any confidential document submitted to the court.

11       **23. Survival of Obligations.** The obligations imposed by this protective  
12 order survive the termination of this action.

13       **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter  
14 this Order and to provide copies to counsel.

15       **DATED** this 23rd day of June 2021.



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A handwritten signature in blue ink that reads "Stanley A. Bastian". The signature is written in a cursive style and is positioned above a horizontal line.

21           Stanley A. Bastian  
22 Chief United States District Judge  
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